

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

ELOUISE PEPION COBELL, <u>et al.</u> ,	)	
	)	
Plaintiffs,	)	No. 1:96CV01285
v.	)	(Judge Lamberth)
	)	
GALE A. NORTON, Secretary of	)	
the Interior, <u>et al.</u> ,	)	
	)	
Defendants.	)	
_____	)	

**DEFENDANTS' OPPOSITION TO  
PLAINTIFFS' CONSOLIDATED MOTION TO COMPEL PRODUCTION OF  
DOCUMENTS AND REQUEST FOR SANCTIONS PURSUANT TO RULE 37**

Defendants oppose Plaintiffs' Consolidated Motion To Compel Production Of Documents And Request For Sanctions Pursuant To Rule 37 ("Motion") and respectfully urge the Court to deny it. In a mere five and a half pages of text, it purports to claim entitlement to an order compelling something approaching production of all documents ever requested by plaintiffs since the inception of this case (over 300 individual requests), plus every document ever requested by any judicially appointed officials in this case. Beyond the cavalier brevity of the motion and the preposterous breadth of relief it seeks, the motion is specious, misleading and tardy. The motion fails to comply with the local rules. It was filed without even the barest good faith attempt to confer as required by Federal Rule of Civil Procedure 37(a)(2)(B). It is based upon misrepresentations of the record. The motion should be denied.

## FACTS

The instant motion generally involves two types of document requests: (1) plaintiffs' formal written requests for production made pursuant to Federal Rule of Civil Procedure 34<sup>1</sup> and (2) written letter requests made by judicially appointed officials (Special Master Balaran and former Special Master-Monitor Kieffer). According to their proposed order, plaintiffs seek three things in addition to an award of sanctions: (1) an order to compel production of "all documents and other information" with respect to the second, third, fourth, sixth, and eighth, formal requests for production;<sup>2</sup> (2) an order to compel production of "all documents and other information that defendants have submitted to the Special Master and the Special Master-Monitor"; and (3) an order directing production of "privilege logs that identify and describe each document that defendants are withholding from Plaintiffs on grounds other than attorney-client privilege or work product doctrine." Plaintiffs' Proposed Order at 1.

As plaintiffs omit essential facts bearing on the document productions at issue, a chronology is needed. The Court bifurcated this case into two trial phases in 1998. In its May 5, 1998 Scheduling Order, the Court directed that for purposes of trial and for "trial preparation purposes," the case would be divided "to the greatest extent feasible" between "that aspect which

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<sup>1/</sup> These discovery requests are entitled: Plaintiffs' Second Formal Request for Production of Documents (June 5, 1998); Plaintiffs' Third Formal Request for Production of Documents (June 11, 1998); Plaintiffs' Fourth Formal Request for Production of Documents (October 19, 1998); Plaintiffs' Sixth Formal Request for Production of Documents (December 30, 1999); Plaintiffs' Seventh Formal Request for Production of Documents (January 30, 2002); and Plaintiffs' Eighth Formal Request for Production of Documents (December 16, 2002) ("requests" or "RFPs").

<sup>2/</sup> Plaintiffs concede that their "first and fifth requests for production are not relevant to the instant motion." Motion at 3 n.2. Plaintiffs' so-called "ninth" request for production for which they also seek an order to compel and which is addressed separately below, is not a valid Rule 34 request at all.

seeks to institute new trust management practices, often referred to as ‘fixing the system,’ and that aspect which seeks to obtain an accounting or approximation thereof and to correct the accounts of the members of the plaintiff class, often referred to as ‘correcting the accounts.’” Scheduling Order at 2 (May 5, 1998).

The first trial, held during 1999, resulted in a decision adverse to defendants, which the Court then certified for interlocutory appeal. The case was affirmed and remanded for further proceedings. On September 17, 2002, this Court ordered that trial of the remaining issues be further bifurcated and, following additional discovery, held a second trial, known as Phase 1.5, during the summer of 2003. The Court rendered its findings and conclusions for Phase 1.5 on September 25, 2003.

Plaintiffs propounded their second, third, fourth and fifth sets of document requests on defendants prior to the first trial. Plaintiffs served their sixth, seventh and eighth requests for documents after the first trial but before the second. Defendants timely responded in writing to each set of document requests.<sup>3</sup> Each response asserts general objections and specific objections to the requests. The responses, for example, expressly object to the document requests to the extent they seek production of materials that are not within the scope of discovery set by Fed. R.

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<sup>3</sup> The corresponding responses are: Defendants' Response To Plaintiffs' Second Formal Request For Production Of Documents (July 14, 1998); Defendants' Response To Plaintiffs' Second Formal Request For Production Of Documents (1st Supplemental) (July 15, 1998); Defendants' Response To Plaintiffs' Third Formal Request For Production Of Documents (August 12, 1998); Defendants' Response To Plaintiffs' Fourth Formal Request For Production Of Documents (December 15, 1998); United States' Supplemental Response To Plaintiffs' Fourth Formal Request For Production Of Documents (May 10, 1999); Defendants' Response To Plaintiffs' Sixth Formal Request For Production Of Documents (March 1, 2000); Defendants' Response To Plaintiffs' Seventh Formal Request For Production Of Documents (March 4, 2002); and Defendants' Response To Plaintiffs' Eighth Formal Request For Production Of Documents (January 23, 2003).

Civ. P. 26, that is, not relevant to the case nor reasonably likely to lead to discovery of admissible evidence. Most, if not all, the responses also object to the requests to the extent they seek to impose obligations exceeding those set by the Federal Rules of Civil Procedure.<sup>4</sup>

Plaintiffs neglect to mention that they sought to compel production of the first group at least twice already in this case. In 1999, plaintiffs filed a series of separate motions to compel production of documents for which defendants had asserted privilege. In each motion, plaintiffs expressly affirmed that "defendants submitted a privilege log and the allegedly privileged documents to the Court for *in camera* inspection."<sup>5</sup> In addition to the production of privilege logs and *in camera* production of the documents, defendants submitted a consolidated opposition to all of plaintiffs' motions to compel.<sup>6</sup> These motions were referred to the Special Master, who issued a recommended Opinion and Order in which he opined that the motions to compel should be granted as to documents subject to claims of attorney-client or deliberative process privilege, and granted in part and denied in part as to certain types of documents subject to a work product privilege. Opinion and Order at 18 (May 11, 1999).

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<sup>4/</sup> Thus, plaintiffs are simply wrong when they contend that "defendants did not object to . . . instructions" that purport to impose a supplementation obligation exceeding that recognized under the Federal Rules of Civil Procedure. See Motion at 3 n.2.

<sup>5/</sup> See Plaintiffs' Motion To Compel Production Of Documents Responsive To Plaintiffs' Second Formal Request For Production Of Documents at 1 (January 29, 1999); Plaintiffs' Motion To Compel Production Of Documents Responsive To Plaintiffs' Third Formal Request For Production Of Documents at 1-2 (January 29, 1999); and Plaintiffs' Motion To Compel Production Of Documents Responsive To Plaintiffs' Fourth And Fifth Formal Request For Production Of Documents at 1 (January 29, 1999).

<sup>6/</sup> United States' Consolidated Response In Opposition To Plaintiffs' Motion To Compel Production Of Documents Responsive To Plaintiffs' Second, Third, Fourth, And Fifth Formal Requests For Production Of Documents (February 12, 1999).

In the weeks following the Special Master's findings, defendants reviewed their privilege logs responsive to plaintiffs' second, third, fourth and fifth requests, and released a number of the documents to plaintiffs. See Letter from Charles Findlay to Keith Harper (May 25, 1999) (Exhibit 1). Plaintiffs at that time neither moved to have the Special Master's recommended opinion adopted, nor did they move to compel release of the remaining documents that defendants continued to withhold as privileged.<sup>7</sup>

Following the first phase trial, defendants submitted to the Special Master and served two notices identifying those document requests which, in defendants' view, were complete or concluded, and those which had continuing relevance to the case after the first trial. Notice Regarding Defendants' Supplementation Of Plaintiffs' Second, Fourth And Fifth Requests For Production (Nov. 10, 1999) ("Supplementation Notice No.1") (Exhibit 3); Notice Regarding Defendants' Supplementation Of Plaintiffs' Third Request For Production (Feb. 18, 2000) ("Supplementation Notice No. 2") (Exhibit 4).

The first notice discloses that defendants had reviewed their responses to the second, fourth and fifth sets of requests and categorized each response into one of four types: (a) requests pertaining to trust reform issues that were tried in Phase 1; (b) requests relating to accounting issues that still await trial; (c) requests for specific materials that have been already produced;

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<sup>7</sup> Plaintiffs' second request to compel further production of these requests occurred after the Court ordered a trial Phase 1.5 be held and opened discovery for that purpose. During the first discovery conference held before Special Master Monitor Kieffer on October 3, 2002, plaintiffs urged Mr. Kieffer to compel defendants to produce all documents responsive to the second, third, fourth, sixth and seventh formal requests, but the Special Master Monitor expressly refused to entertain the request. See Letter from Special Master-Monitor Joseph S. Kieffer, III to the parties (October 4, 2002)(incorrectly dated October 2, 2002) (Exhibit 2). Instead, he directed plaintiffs to bring the matter up before Special Master Balaran if they wanted to compel. Id. Plaintiffs made no such motion.

and (d) requests relating to Paragraph 19 of the Court's First Order Of Production Of Information. Supplementation Notice No. 1 at 1. The notice states that requests falling into category (a) constitute "post-trial" discovery not contemplated by the rules, while requests in category (b) remain open for supplementation. Id. at 2. It then proceeds to identify which specific requests fall into these categories.<sup>8</sup> The second notice makes a similar disclosure with respect to plaintiffs' third request for production. Plaintiffs do not appear to have ever commented on or challenged either notice.

Thereafter, plaintiffs served three more requests for production, the sixth, seventh and eighth request, the last of which was propounded during the Phase 1.5 discovery period. Defendants have served written responses to each of these later requests and have either offered documents for inspection or made partial productions. For example, given the volume of documents sought by the sixth request, defendants offered to make responsive documents available for inspection by plaintiffs, but plaintiffs did not avail themselves of this offer in any meaningful way. As concerns the seventh request, plaintiffs did file a motion to compel, but the matter has been pending before Special Master Balaran, who is still superintending that production. Plaintiffs have not to date approached defendants regarding their detailed response to the eighth request, which, inter alia, offers to make voluminous records available for inspection and, for certain items, to compile summary data in lieu of an extensive document production, provided plaintiffs shoulder the added expense.

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<sup>8</sup> The notice also states that category (c), completed productions, requires no supplementation, while Court Ordered materials, category (d), requires some further analysis. Id. at 5-6.

On March 7, 2003, with less than thirty days remaining before the close of discovery, plaintiffs issued a subpoena duces tecum directed to Secretary Norton in her official capacity. Although defendants' counsel offered to accept personal service on the Secretary's behalf, plaintiffs made no attempt to effect personal service, as Rule 45 requires. In reality, the "subpoena" was an attempted end run around the thirty day response period afforded to document requests issued under Rule 34. Plaintiffs did not move to extend the fact discovery period, which closed on March 28, 2003,<sup>9</sup> nor did they move to shorten defendants' time for response. Having failed to serve the request at least thirty days before March 28, the request was rendered invalid by the close of discovery. Plaintiffs now claim that their failed subpoena is really their ninth request.

The second group of documents covered by plaintiffs' motion involves those requested – not by plaintiffs – but by either Special Master Balaran or former Court Monitor and Special Master-Monitor Kieffer. At various times during their tenure, these judicial officers made written requests to defendants to review documents. These requests were not requests for production made under Rule 34 but were premised upon authority delegated to the respective officer to investigate or report on certain matters. Defendants, in most cases, provided plaintiffs with courtesy copy of documents provided to the Special Master or Court Monitor/Special Master-Monitor, except for privileged matter shown to a judicial officer *in camera*. In the latter situation, defendants provided plaintiffs with a privilege log when a privilege review was completed.

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<sup>9</sup> Although the Court's Scheduling Order originally set March 24 as the last day for fact discovery, the Special Master-Monitor allowed some additional fact discovery through March 28, 2003.

## ARGUMENT

### **I. Plaintiffs' Motion To Compel Is Barred As Untimely**

Plaintiffs are not entitled to any relief, because they come too late. The second, third, and fourth requests are all five years old. They were propounded and responded to by defendants before two trials have been undertaken in this case. Following trial in Phase 1, but still nearly four years ago, defendants expressly put plaintiffs on notice concerning defendants' understanding of their obligation to supplement these older production requests. Plaintiffs remained silent for years, even after a second trial was held.

Similarly, the fifth, sixth and seventh requests were served well before the Phase 1.5 discovery period even opened. Defendants served a timely and detailed response to plaintiffs' eighth request in January 2003, but plaintiffs made no comment about defendants' response until after the Phase 1.5 trial decision. Likewise, even though defendants clearly and promptly informed plaintiffs that the subpoena duces tecum (the so-called "ninth" request) was invalid, plaintiffs failed to seek any relief before the Phase 1.5 discovery period closed.

If a party seeks to compel a production but unduly delays seeking that relief, the court can treat the motion to compel as untimely. Charles Alan Wright, Arthur R. Miller & Richard L. Marcus, 8A FEDERAL PRACTICE & PROCEDURE § 2285 (2d ed. Supp. 2003). Federal Rule of Civil Procedure 37 does not specify a time limit within which a motion to compel must be brought, but “courts have made it clear that a party seeking to compel discovery must do so in timely fashion.” Continental Indus. v. Integrated Logistics Solutions, 211 F.R.D. 442, 444 (N.D. Okla. 2002) (motion to compel late when filed before trial but six months after discovery closed); Buttler v. Benson, 193 F.R.D. 664, 666 (D. Colo. 2000) (“A party cannot ignore available



discovery remedies for months and then, on the eve of trial, move the court for an order compelling production."); see also Rossetto v. Pabst Brewing Co., 217 F.3d 539 (no error in denying plaintiffs' motion to compel filed two months after discovery closed, with no excuse for the tardiness).

After a party responds to a production request, the initiative falls to the discovering party to move promptly for an order to compel. Clinchfield R. Co. v. Lynch, 700 F.2d 126, 132 n. 10 (4th Cir. 1983). Failure to pursue a discovery remedy in timely fashion can also constitute a waiver of discovery violations. U.S. Fidelity & Guaranty Co. v. Baker Material Handling Corp., 62 F.3d 24, 29 (1st Cir. 1995) (proceeding to trial without seeking relief under Rule 37 waives claim discovery violations made trial unfair); DesRosiers v. Moran, 949 F.2d 15, 22 n. 8 (1st Cir.1991). It is especially important that a party file its motion before discovery cutoff. Continental Indus., 211 F.R.D. at 444; American Motorists Insurance Co. v. General Host Corp., 162 F.R.D. 646, 647-48 (D. Kan.1995) (motion to compel denied where defendant made "absolutely no effort" to file motion before discovery deadline). A party also has an obligation to seek relief well in advance of trial. JOM, Inc. v. Adell Plastics, Inc., 193 F.3d 47, 51 (1st Cir.1999) (noting party's obligation to move to compel "well in advance of trial").

In the instant case, plaintiffs have waited several years to assert many of the claims made in the motion. As regards plaintiffs' request for further privilege logs, plaintiffs premise their argument on the recent dismissal of one appeal, but the underlying privilege issues and the asserted basis for the relief sought are rooted in Special Master Balaran's recommended Opinion and Order, issued more than four years ago. Likewise, plaintiffs were well aware of defendants' responses to later production requests and the status of document production but made no effort

whatsoever to seek relief until now. When a party requests discovery, then delays for no discernable reason in seeking to compel and then combines the motion with a broad request for sanctions, a court may conclude that plaintiff had held his discovery motion in abeyance for a strategic purpose. Buttler v. Benson, 193 F.R.D. at 666. That suspicion is especially present here, when defendants have long ago made a good faith effort to put plaintiffs on notice, after the Phase 1 trial, of defendants' position concerning their duty to supplement older discovery requests. Defendants disclosed what they considered to be their continuing duty to supplement, and plaintiffs remained silent for four years.<sup>10</sup> Even as to the eighth request, defendants provided a detailed 124-page response, but plaintiffs never even attempted to confer with defendants, as required by Fed. R. Civ. P. 37(a)(2)(B), in a good faith effort to obtain the materials they desired without court intervention. Instead, plaintiffs simply move after trial to compel and obtain sanctions. The Court should deny the motion in its entirety as out of time.

Plaintiffs will no doubt point to the dismissal of the privilege issues appeal and contend that this more recent event justifies their late motion to compel. That appeal, at most, involves only questions concerning privilege claims, and so provides no justification for plaintiffs' late demands for other documents. Even as regards matters of privilege, plaintiffs had the Special Master's May 1999 recommended Opinion and Order on privilege issues, but failed to request

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<sup>10/</sup> The aforementioned supplementation will continue. Although plaintiffs' ability to compel further production may have expired, the duty to supplement remains until judgment. This duty, however, is not necessarily as broad as what a discovering party might seek in the first instance. The duty to supplement under Fed. R. Civ. P. 26(e) only arises when "the party learns that the [prior] response is in some *material respect incomplete or incorrect* and if the additional or corrective information *has not otherwise been made known* to the other parties during the discovery process or in writing." Fed. R. Civ. P. 26(e)(2) (emphasis added).

promptly that the Court adopt the decision or enforce it. They offer no excuse for their tardiness, and none exists. The motion should be denied.

**II. The Motion Must Be Denied For Failure To Comply With The Federal Rules Of Civil Procedure And Local Rules**

The instant motion fails to comply with the letter and spirit of Federal Rule of Civil Procedure 37(a)(2)(B) and Local Rule 5.2. The federal rule mandates that before a motion to compel can be filed, the moving party must make a good faith effort to consult with the opposing party and attempt to obtain the materials they desire without court intervention. A party making a motion to compel must certify under Rule 37(a)(2)(B) that such a good faith effort was indeed made. Local Rule 5.2 requires that a motion to compel discovery must "be accompanied by a copy of, or . . . set forth verbatim, the relevant portion of any nonfiled discovery materials to which the motion is addressed." Both of these rules are designed to discourage sweeping, amorphous discovery claims and to require instead that motions to compel set forth focused, well defined discovery targets upon which the court may readily rule. Contrary to these rules, plaintiffs have laid claim to production of over 300 separately enumerated requests without so much as specifying their entitlement to any individual request or rebutting any asserted objections.<sup>11</sup> Tellingly, plaintiffs certify under the "local rules" that they conferred with counsel concerning the instant motion, Motion at 7 n.9, but they do not certify, as required by Fed. R. Civ. P. 37(a)(2)(B), that they have made any effort to obtain the discovery they now demand without court intervention.

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<sup>11/</sup> The service copy of plaintiffs' motion delivered to defendants contained no exhibits or other discovery material.

Plaintiffs seek to burden the Court with hundreds of separate document requests, propounded at different times, to which various responses have been given, some of which are so old, that they may no longer even be relevant to the case. Moreover, especially as to the older sets of requests, plaintiffs are demanding further *supplementation* of those discovery responses without having made any inquiry of defendants to determine whether, in fact, any supplementation would even be appropriate under the rules. The Court should refuse to take on this burden when plaintiffs themselves have shirked all responsibility to determine whether any real discovery dispute or obligation to supplement even exists.

### **III. Plaintiffs are “Estopped” From Seeking To Compel The Older Requests**

Without explanation or warrant, plaintiffs seek to compel production of “all documents and other information responsive to Plaintiffs' second, third, fourth, sixth, eighth and ninth<sup>12</sup> requests for production.” See Plaintiffs’ Proposed Order at 1.<sup>13</sup> Regarding RFPs 2, 3, and 4, however, defendants have already provided responsive documents that relate to trust reform issues. Following the Phase 1 trial, defendants served two notices on plaintiffs advising them that defendants considered certain document requests in RFPs 2, 3, and 4 (as well as RFP 5) to be fully satisfied or no longer subject to a duty to supplement because trust reform issues were no longer relevant. Defendants gave a detailed explanation of why no further supplementation was required and identified the requests for plaintiffs in good faith. Defendants are not aware of any challenge, comment or complaint concerning the positions taken in the two notices. Moreover,

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<sup>12/</sup> Plaintiffs’ “ninth” request is actually plaintiffs' defective subpoena duces tecum from March 2003.

<sup>13/</sup> Plaintiffs state that their “first and fifth requests for production are not relevant to the instant motion.” Motion at 3 n.2.

plaintiffs wholly fail to advise the Court of these notices in their motion. Given the passage of almost four years in silence and defendants' reliance thereon, plaintiffs should be estopped from obtaining any further discovery that is inconsistent with the notices. They have not suggested or provided any basis or evidence why the status quo should be changed.

Furthermore, plaintiffs' present motion is not their first effort to revisit past, long settled discovery. Shortly after the Court's September 17, 2002 order establishing a Phase 1.5 trial, Special Master-Monitor Joseph S. Kieffer, III, addressed a number of discovery issues with the parties. In doing so, he also directly addressed the Court's September 17, 2002 grant that "permit[ted] plaintiffs full discovery on matters that they otherwise would not have been able to explore prior to this decision." The Special Master-Monitor plainly read the Court's language to mean that discovery propounded under that grant would be "in preparation for the Phase 1.5 trial." See Letter from Special Master-Monitor Joseph S. Kieffer, III to Sandra P. Spooner and Keith Harper (September 29, 2002) (Exhibit 5). Plaintiffs did not contend then that this discovery grant extended to other matters or proceedings outside the Phase 1.5 trial. That contention is a recent invention by plaintiffs.

With that understanding, plaintiffs proposed a scheduling order that required, among other things, for "[a]ll documents responsive to plaintiffs' outstanding discovery, including without limitation *Plaintiffs' Second, Third, Fourth, Sixth and Seventh Formal Requests for Production of Documents*" to be produced. See Letter from Keith Harper to Special Master-Monitor Joseph S. Kieffer, III (October 2, 2002) (Exhibit 6). In response, Special Master-Monitor Kieffer expressly declined to enter or endorse an order requiring the production plaintiffs sought. Instead, the Special Master-Monitor directed plaintiffs to "the Court or Special

Master, depending on which official has addressed the issues dealing with these requests in the past.” See Letter from Special Master-Monitor Joseph S. Kieffer, III to the parties (October 4, 2002)(incorrectly dated October 2, 2002) (Exhibit 2).

Plaintiffs failed to do so. Despite the express opportunity and invitation to pursue matters further on these discovery requests, plaintiffs did not raise any of these matters with the Court or the Special Master. The Court should not entertain them.

#### **IV. Plaintiffs’ Complaints About Privilege Claims Are Unfounded**

##### **A. Plaintiffs’ Misinterpret The Appeal And Its Voluntary Dismissal**

Plaintiffs have misconstrued the scope of the Court of Appeals’ dismissal of defendants’ privilege appeal. Plaintiffs contend that the D.C. Circuit’s order means that all prior assertions of privilege by defendants in this litigation – including assertions in response to the discovery requests that are the subject of plaintiffs’ instant motion – have now been waived. Motion at 2. Plaintiffs are mistaken. The Court of Appeals, in granting defendants’ motion to dismiss the privilege appeals voluntarily, issued a narrow and pointed order that the “currently pending challenges to the district court’s application of the fiduciary exception to the attorney-client privilege and the work product doctrine” were waived. Cobell v. Norton, No. 03-5063, 2003 WL 22136383, at \*1 (D.C. Cir. Sept. 9, 2003) (per curiam). The Court’s December 23, 2002 Memorandum Opinion, Cobell v. Norton, 212 F.R.D. 24 (D.D.C. 2002), and the February 5, 2003 Memorandum Opinion, Cobell v. Norton, 213 F.R.D.1 (D.D.C. 2003), were the only “applications” of the fiduciary exception at issue on appeal. The “currently pending challenges” that were waived upon dismissal of the appeals thus refer only to the Court’s rulings in those opinions.

This Court made quite clear that its December 23, 2002 application of the fiduciary exception was limited to the "sole specific discovery issue at hand – namely, defendants' assertion of attorney-client privilege in response to the question posed to James E. Cason during his deposition by plaintiffs' counsel." 212 F.R.D. at 31. In the February 5, 2003 opinion, the Court ruled on certain instances where a deliberative process privilege had been raised, 213 F.R.D. at 7-10, and applied the fiduciary exception to the assertion of the work product privilege as discussed in the Special Master's May 12, 1999 recommended opinion.<sup>14</sup> 213 F.R.D. at 10-14.

It is thus only these specific applications of the fiduciary exception that were the subject of the privilege appeals, and it is only a challenge to these applications which have now been waived upon dismissal of the appeal. The Court of Appeals' ruling on defendants' dismissal motion does not reach any other assertion of privilege by defendants and the dismissal of the privilege appeals does not constitute a "waiver" of all privilege claims. The D.C. Circuit did not, and could not, rule that any other such assertions of privilege were somehow "waived" by the voluntary dismissal of the appeals that were before them.<sup>15</sup>

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<sup>14</sup> The Court adopted the Special Master's conclusions regarding the work product doctrine, 213 F.R.D. at 14, but declined to adopt his conclusions with respect to the deliberative process privilege, *id.*, and the attorney-client privilege. *Id.* at 10.

<sup>15</sup> Also, the government made a "conditional" motion for extension of the briefing schedule on appeal. *See* Federal Government's Reply In Support of Motion for Voluntary Dismissal of Consolidated Appeals at 6 (August 25, 2003) (attached as Exhibit 7). The "condition" was that the government would withdraw the motion to dismiss if the Court of Appeals intended the dismissal of the privilege appeals to have any effect on future privilege issues in the case, as had been urged by plaintiffs. Reply at 6. The Court of Appeals denied the conditional motion for extension as "moot." 2003 WL 22136383, at \*1. It was moot because the dismissal obviously did not affect other privilege issues in this case in the way that plaintiffs are now claiming.

For example, the Special Master's May 1999 decision regarding the work product privilege expressly noted that the privilege remained intact for certain work product documents and not others. Special Master Opinion and Order at 18. (May 12, 1999). This Court adopted that part of the Special Master's 1999 decision in its February 2003 order, so there clearly remains a basis to assert that work product privileges still attach to certain documents. Similarly, the Court has not adopted any rule that eviscerates the deliberative process privilege in this case.

B. Plaintiffs Misrepresent The State Of Privilege Logs Prepared By Defendants

Plaintiffs nakedly claim, with respect to "other requests (i.e., second, third, fourth and seventh requests for production)" that they "cannot identify documents withheld on privilege grounds because Norton and Martin did not provide the requisite privilege logs which would have enabled plaintiffs to identify and contest each of Norton's wrongfully asserted privilege claims." Motion at 3. They seem to have forgotten that when all these requests became the subject of motions to compel in early 1999, plaintiffs expressly affirmed in every motion that "defendants submitted a privilege log and the allegedly privileged documents to the Court for *in camera* inspection."<sup>16</sup> In the instant motion, plaintiffs hardly acknowledge that any logs were ever provided, much less demonstrate with any specificity why these logs are insufficient to enable plaintiffs to identify allegedly "wrongful" claims of privilege.<sup>17</sup> By failing even to address

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<sup>16/</sup> See supra note 5.

<sup>17/</sup> It is precisely for such purposes that the federal rules contemplate that parties will confer beforehand to resolve such differences. See Fed. R. Civ. P. 37(a)(2)(B).



the logs that were produced, plaintiffs have not made a good faith showing that they are entitled to any additional information.<sup>18</sup>

**V. A Motion To Compel Does Not Apply To Requests Made By A Judicial Officer**

Plaintiffs argue that the Special Master and Special Master-Monitor have propounded numerous requests for documents and that plaintiffs did not receive copies of all the documents or privilege logs produced. Motion at 4, 5. Plaintiffs disingenuously imply that they "frequently" were not provided with copies of materials produced to the judicial officers and were not given a privilege log. To the contrary, plaintiffs were given copies of non-privileged documents most of the time and privilege logs as they were prepared.<sup>19</sup> Even if plaintiffs are missing certain documents or logs, they are not entitled to obtain them by a motion to compel. Rule 37(a)(2) of the Federal Rules of Civil Procedure establishes the proper scope of a motion to compel. Rule

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<sup>18/</sup> With respect to the seventh request, defendants are still making productions. In accordance with the Special Master's arrangement, defendants have been making rolling productions of responsive documents, and are compiling a privilege log for production to plaintiffs when production is complete. Nothing in the rules mandates waiver of privilege merely because the privilege log is not ready at the time the privilege objection is first asserted. Moreover, because plaintiffs already have pending before Special Master Balaran a motion to compel production responsive to their seventh request, including a claim that privileges have been waived, it would be improper and a waste of judicial resources for the Court to entertain the same issue again in this motion.

<sup>19/</sup> The two isolated instances cited by plaintiffs to the contrary are far more indicative of the extent to which plaintiffs fail to disclose the true facts to the Court than anything related to discovery compliance by the defendants. They complain of not receiving documents relating to IT security, Motion at 4, but do not disclose that, by letter of July 23, 2001, plaintiffs' counsel specifically confirmed that plaintiffs would no longer accept any confidential documents relating to IT security. See Letter from Dennis Gingold to Charles W. Findlay (July 23, 2001) (Exhibit 8). They protest that they did not receive documents or a privilege log in connection with the Special Master's request for documents concerning the NAID allegations regarding the Eighth Quarterly Report, Motion at 4, but they fail to explain that this is because the Special Master elected to review these documents in camera.

37(a)(2)(A) permits such motions when a party fails to make a required disclosure under Rule 26(a),<sup>20</sup> but judicial officer requests are not Rule 26(a) "disclosures." Rule 37(a)(2)(B) authorizes a motion to compel in four limited circumstances not applicable to requests by judicial officials: (1) to answer a deposition question under Rule 30 or 31; (2) to designate a witness under Rule 30(b)(6) or 31(a); (3) to answer an interrogatory made under Rule 33; or (4) to permit an inspection of documents or things requested under Rule 34. Nothing in Rule 37 authorizes a motion to compel a copy of documents requested by a judicial official or a related privilege log.<sup>21</sup> Plaintiffs' motion, therefore, is improper and must be denied.<sup>22</sup>

#### **VI. The So-Called "Ninth" Request Was Void Upon Issuance**

As described in the fact section, although plaintiffs' motion seeks to compel production of documents in response to a "ninth request," no such document exists. Instead, as later acknowledged by plaintiffs in Plaintiffs' Notice of Clarification Regarding Plaintiffs' Consolidated Motion to Compel Production of Documents and Request for Sanctions Pursuant to Rule 37, the so-called "ninth" request is in reality an aborted Rule 45 subpoena duces tecum.

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<sup>20/</sup> The subsection provides, in pertinent part: "If a party fails to make a disclosure required by Rule 26(a), any other party may move to compel disclosure and for appropriate sanctions." Fed. R. Civ. P. 37(a)(2)(A).

<sup>21/</sup> Moreover, Rule 37(a)(2)(B) only authorizes the party that propounded the discovery to move to compel compliance. See 7 James Wm. Moore, MOORE'S FEDERAL PRACTICE § 37.04 (3d ed. 2003). Here, plaintiffs are not the "discovering party" with respect to document requests made by judicial officers.

<sup>22/</sup> In addition, the Court of Appeals has held that the investigatory activities of the Special Master-Monitor were improper. Cobell v. Norton, 334 F.3d 1128, 1142 (D.C. Cir. 2003). If it is inappropriate for a judicial officer to make such document requests in the first place, then it would plainly be wrong to compel the production of documents to anyone else based solely upon the Special Master's improper request.

This subpoena was merely a ruse by plaintiffs in an attempt to circumvent the Federal Rules of Civil Procedure and the discovery deadline set by the Court for Phase 1.5. It is of no effect and cannot be a legitimate basis for any motion to compel.

The Court ordered that all fact discovery be completed by March 28, 2003. Federal Rule 34 expressly affords any party served with a document request thirty days to respond. This necessarily meant that any request for production during the Phase 1.5 discovery had to be served no later than February 21, 2003 in order to have the 30-day response period end by March 24. Apparently aware that this deadline had passed by early March, plaintiffs issued a subpoena duces tecum in the name of the Secretary of the Interior and attached a lengthy document request. Although plaintiffs requested and defendants offered to arrange to accept personal service of the subpoena on the Secretary's behalf, plaintiffs never effected personal service.<sup>23</sup> Instead, plaintiffs merely faxed a copy of the subpoena to the Department of Justice.

Pursuant to Rule 45, defendants duly notified plaintiffs by letter that they objected to the subpoena in its entirety. See Letter from Sandra P. Spooner to Keith Harper (March 21, 2003) (Exhibit 9). Not only was service defective, but the return date for the document request did not afford the Secretary the full thirty day period to which she was entitled as a party under Rule 34. Moreover, since the subpoena was issued less than thirty days prior to the close of discovery, the document request was improper and invalid under Rule 34. Aside from a taciturn reply to defendants' stated objections, see Letter from Mark Brown to Sandra P. Spooner (March 24, 2003) (Exhibit 10), plaintiffs made no effort to enforce the subpoena or, alternatively, to compel production, until now.

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<sup>23/</sup>Indeed, defendants are not aware of any return of service ever having been filed with the Court.

Since the request did not afford the required response time, plaintiffs were obligated to ask this Court either for an extension of the discovery period in order to allow sufficient time for a response under Rule 34 or for an order shortening the response period for that request. Having chosen instead to do nothing, the discovery request was invalid and may not be enforced.

**VII. Plaintiffs Are Not Entitled To Any Award Of Sanctions**

Plaintiffs are not entitled to any award of expenses and attorney fees. Rule 37 (a)(4) establishes the conditions under which a court should award the reasonable expenses, including attorney fees, with respect to a motion to compel. The rule provides that the Court "shall" award such fees and costs to the prevailing party on the motion. Compare Fed. R. Civ. P. 37(a)(4)(A) (permitting assessment of costs and fees against the party necessitating the motion, if granted) with 37(a)(4)(B) (providing for assessment of fees and costs against the movant if motion is denied). Defendants have amply demonstrated that the motion to compel is defective in multiple respects and should be denied.

Even if the Court were inclined to grant part or most of plaintiffs' motion, defendants should nevertheless not be held responsible for plaintiffs' costs or expenses. First, Rule 37(a)(4)(A) expressly provides that if "the court finds that the motion was filed without the movant's first making a good faith effort to obtain the disclosure or discovery without court action," no sanctions should be awarded. Here, plaintiffs do not even feign an attempt to resolve any of their discovery grievances without court intervention. Second, the same rule also allows a court to refuse an award of sanctions whenever the "opposing party's nondisclosure, response, or objection was substantially justified." Defendants' opposition to the motion is well-grounded and

substantially justified. Thus, the court should not award any monetary sanctions to plaintiffs even if it were to grant all or part of the instant motion.

### **CONCLUSION**

For the foregoing reasons, plaintiffs' motion to compel and for sanctions should be denied in all respects.

Dated: October 30, 2003

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that, on October 30, 2003 the foregoing *Defendants' Opposition to Plaintiffs' Consolidated Motion to Compel Production of Documents and Request for Sanctions Pursuant to Rule 37* was served by Electronic Case Filing, or as otherwise indicated below, upon:

Dennis M. Gingold, Esq.  
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Per the Court's Order of April 17, 2003,  
by Facsimile and by U.S. Mail upon:

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/s/ Kevin Kingston

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